Steven J. Nataupsky (State Bar No. 155,913)
snataupsky@kmob.com
Boris Zelkind (State Bar No. 214,014)
boris.zelkind@kmob.com
Ali S. Razai (State Bar No. 246,922)
ali.razai@kmob.com
KNOBBE, MARTENS, OLSON & BEAR, LLP
550 West C Street, Suite 1200
San Diego, CA 92101
Telephone: (619) 235-8550
Facsimile: (619) 235-0176

Attorneys for Plaintiff and Counter-Defendant
I-FLOW CORPORATION

IN THE UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF CALIFORNIA

I-FLOW Corporation, a Delaware corporation Plaintiff, v. Zone Medical LLC, a California limited liability company, Defendant.	)))))))))))	Civil Action No. 08cv0057 DMS (NLS) **PLAINTIFF'S REPLY IN SUPPORT OF ITS MOTION TO CONSOLIDATE** Date: April 11, 2008 Time: 1:30 p.m. Courtroom 10, 2nd Floor Honorable Dana M. Sabraw

Plaintiff I-Flow Corporation ("I-Flow") hereby submits this reply to Defendant Zone Medical, LLC's ("Zone") Opposition to I-Flow's Motion To Consolidate Case No. 08cv0057 DMS (NLS) (the "Zone Case") against Zone and Case No. 07cv1200 DMS (NLS) (the "Apex Case") against Defendants Apex Medical Technologies, Inc. ("Apex") and Mark McGlothlin Pursuant To Fed. R. Civ. P. 42(a).

I. SUMMARY OF ARGUMENT

The Zone Case and the Apex Case are related cases involving common questions of law and fact making the cases suitable for consolidation under Fed. R. Civ. P. 42(a). Zone did not respond to the facts raised in I-Flow's Motion to Consolidate, including that the Zone and Apex Cases involve common issues of law and fact and that consolidation of the Zone and Apex Cases would serve judicial economy without creating the potential for delay, confusion, and prejudice. Thus, I-Flow's motion stands unopposed on the merits. Zone's sole basis for opposition to this motion rests on a mischaracterization of I-Flow's arguments against application of the doctrine of claim splitting in a different currently pending motion.

II. ARGUMENT

A. Zone Did Not Oppose The Merits Of I-Flow's Motion To Consolidate

Zone has presented no arguments and provides no case law to suggest reasons why the Court should not consolidate the related Zone and Apex Cases. In fact, Zone's Opposition to I-Flow's Motion to Consolidate supports I-Flow's position that the related Zone and Apex Cases involve common issues of law and fact. The related cases involve same '481 patent, the same accused product and the same plaintiff. Zone provides no arguments against consolidation, but rather returns to its faulty analysis of the doctrine of claim splitting presented in Zone's Rule 12(b)(6) motion.

I-Flow pointed out that consolidation would serve judicial economy without creating the potential for delay, confusion, and prejudice. Zone did not respond to this point. Zone also did not dispute that both patent infringement cases involve the same patent, the same product, the same plaintiff and overlapping arguments of infringement, validity and enforceability. Thus, the merits of I-Flow's motion to consolidate remain unopposed.

B. Zone Mischaracterizes I-Flow's Arguments In Another Co-pending Motion

Zone's response consists of mischaracterizations of I-Flow's opposition to Zone's currently pending Motion to Dismiss. Contrary to Zone's erroneous assertions, I-Flow has never argued that the Apex Case and the Zone Case are unrelated. *See* Zone's Opposition, p. 2. I-Flow has always emphasized that the Zone Case and the Apex Case are related cases involving common questions of law and fact. In fact, I-Flow identified the Apex Case in the Notice of Related Cases that was filed with the commencement of this action.

Moreover, I-Flow has expressly argued that the two cases involve common questions of law and fact in response to Zone's Motion to Dismiss. I-Flow announced its plans to seek consolidation of the two related cases, arguing that the "patent infringement claims of the [Zone and Apex Cases] involve the same '481 patent and the same Accused Solace Pump." *See* Plaintiff's Opposition to Defendant's Motion To Dismiss, p. 7. Further, I-Flow argued that if the motion to stay the Apex Case was denied, this action should also move forward because of the substantial overlap of issues and the resulting conservation of judicial economy. Throughout this litigation, I-Flow has consistently maintained the position that the related Zone and Apex Cases involved common issues of law and fact. Any assertion to the contrary is baseless.

Contrary to Zone's assertions, I-Flow opposed Zone's Rule 12(b)(6) claim splitting motion based on the fact that Zone and Apex are not in privity. As explained in I-Flow's opposition to Zone's co-pending motion, the doctrine of claim splitting requires parties to the actions to be in privity. *See Adams v. California Dept. of Health Services,* 487 F.3d 684, 689 (9th Cir. 2007). Zone provided no facts to support the assertion that it is in privity with Apex under the traditional understanding of the term or as a "virtual representative." Zone refused to be bound by the judgment in the Apex Case, and thus it cannot be in privity with Apex. Therefore, Zone's mischaracterization of I- Flow's opposition to the currently pending motion to dismiss is groundless and in no way diminishes the facts presented by I-Flow, which weigh heavily in favor of consolidation.

/ / /

III. CONCLUSION

Judicial economy favors consolidating the related Zone and Apex Cases pending before this court. They involve the same patent, the same accused product and the same plaintiff. Zone has not opposed either of these facts. Therefore, I-Flow respectfully requests that the motion to consolidate be granted.

Respectfully submitted,

KNOBBE, MARTENS, OLSON & BEAR, LLP

Dated: April 4, 2008

By: s/Boris Zelkind
Steven J. Nataupsky
Boris Zelkind
Ali S. Razai

Attorneys for Plaintiff IFLOW CORPORATION

IFLOWL.261L
4715764
010708

PROOF OF SERVICE

I am a citizen of the United States of America and I am employed in San Diego, California. I am over the age of 18 and not a party to the within action. My business address is 550 West C Street, San Diego, California. On April 4, 2008, I caused **PLAINTIFF'S REPLY IN SUPPORT OF ITS MOTION TO CONSOLIDATE** to be electronically filed with the Clerk of the Court using the CM/ECF system which will send electronic notification of such filing to the following person(s):

Norbert Stahl, Esq.
STAHL LAW FIRM
nstahl@patentlawservice.com

I declare that I am employed in the office of a member of the bar of this Court at whose direction the service was made.

Executed on April 4, 2008 at San Diego, California.

Megan Ptacin

5085366
033108